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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Availability of INTELSAT	)	IB Docket No. 00-91
Space Segment Capacity to	)	
Users and Service Providers	)	
Seeking to Access	)	
INTELSAT Directly	)	
	)	

To: The Commission

COMMENTS OF COMSAT CORPORATION

COMSAT Corporation ("COMSAT"),[1] by its attorneys, hereby submits comments in response to the Commission's *Notice of Proposed Rulemaking* ("*Capacity NPRM*") in the above-captioned proceeding.[2] The *Capacity NPRM* was issued pursuant to the requirements of the ORBIT Act. 47 U.S.C. § 641(b).

The ORBIT Act was enacted on March 17, 2000. *See* Pub. L. No. 106-180, 114 Stat. 28 (2000), *codified at* 47 U.S.C. §§ 601-81. It authorizes "direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity or services from INTELSAT . . . at the level commonly referred to by INTELSAT, on the date of

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[1] References to "COMSAT" throughout these comments refer only to COMSAT World Systems ("CWS"), the business unit of COMSAT Corporation that, along with COMSAT's Satellite Systems Investment Management Unit, fulfills COMSAT's function as United States Signatory to INTELSAT. All data and representations contained herein apply only to CWS. Other COMSAT affiliates may use INTELSAT capacity as direct access customers. No data or representations contained herein pertain to such entities.

[2] *Notice of Proposed Rulemaking, In re Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly*, FCC 00-186, IB Docket No. 00-91 (rel. May 24, 2000) ("*Capacity NPRM*").

enactment of this title, as 'Level III.'" 47 U.S.C. § 641(a).[3] In so doing, ORBIT codified the Commission's earlier Order permitting Level III direct access in the United States effective December 6, 1999. *See generally Direct Access to the INTELSAT System*, 14 FCC Rcd 15703 (1999) ("*Direct Access Order*"). The ORBIT Act also directs the Commission to conduct the present proceeding "to determine if users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements." 47 U.S.C. § 641(b). If the Commission determines that such entities *do* have such "sufficient opportunity," its statutory duty under Section 641(b) is thereby fully discharged.

The Commission is directed to take remedial regulatory action only if it "determines that such opportunity to access does not exist." *Id.* ORBIT specifies that such action is warranted only where it is both "necessary" and "appropriate" to facilitate Level III direct access to INTELSAT. *Id.* To this end, ORBIT expressly identifies one potential Commission action as *not* "appropriate" for implementing direct access to INTELSAT: "Nothing in this section shall be construed to permit the abrogation or modification of any contract." *Id.* § 641(c).

I. The Evidence Demonstrates That Users Have "Sufficient Opportunity" To Obtain Level III Direct Access To INTELSAT Space Segment Capacity.

The principal purpose of this proceeding is "to determine if users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements." 47 U.S.C.

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[3] The statutory term "INTELSAT" refers to "the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)." 47 U.S.C. § 681(a)(1). "INTELSAT is an IGO [Intergovernmental Organization] created to own and operate the first commercial global satellite system." *New Skies Satellites, N.V.*, 14 FCC Rcd 13003, ¶ 3 (1999).

§ 641(b). As discussed in Subpart I.D, *infra*, the phrase "sufficient opportunity" must be construed as a "rule of reason." So construed, as the data presented herein demonstrates, such entities *do* enjoy substantial opportunity to obtain INTELSAT space segment capacity directly from INTELSAT. Since direct access was implemented in December 1999, many U.S. users have been able to take advantage of these opportunities. Further, there is every reason to expect the trend toward direct access to continue as INTELSAT deploys more capacity and COMSAT's existing leases and contracts expire.

A. Many U.S. Carriers and Users Already Have Obtained Space Segment Capacity Directly From INTELSAT.

Although "direct access" in the U.S. is only six months old, the amount of direct access usage has increased steadily in terms of number of customers, number of invoice orders, and amount of capacity. *See* Figure 1, below.[4] The total INTELSAT tariff value of U.S. direct access usage has grown by at least 60% each month, and in April, 2000 alone such usage included 22 Bulk Capacity leases[5] and 24 Standardized Circuits.[6] At least 11 U.S. companies

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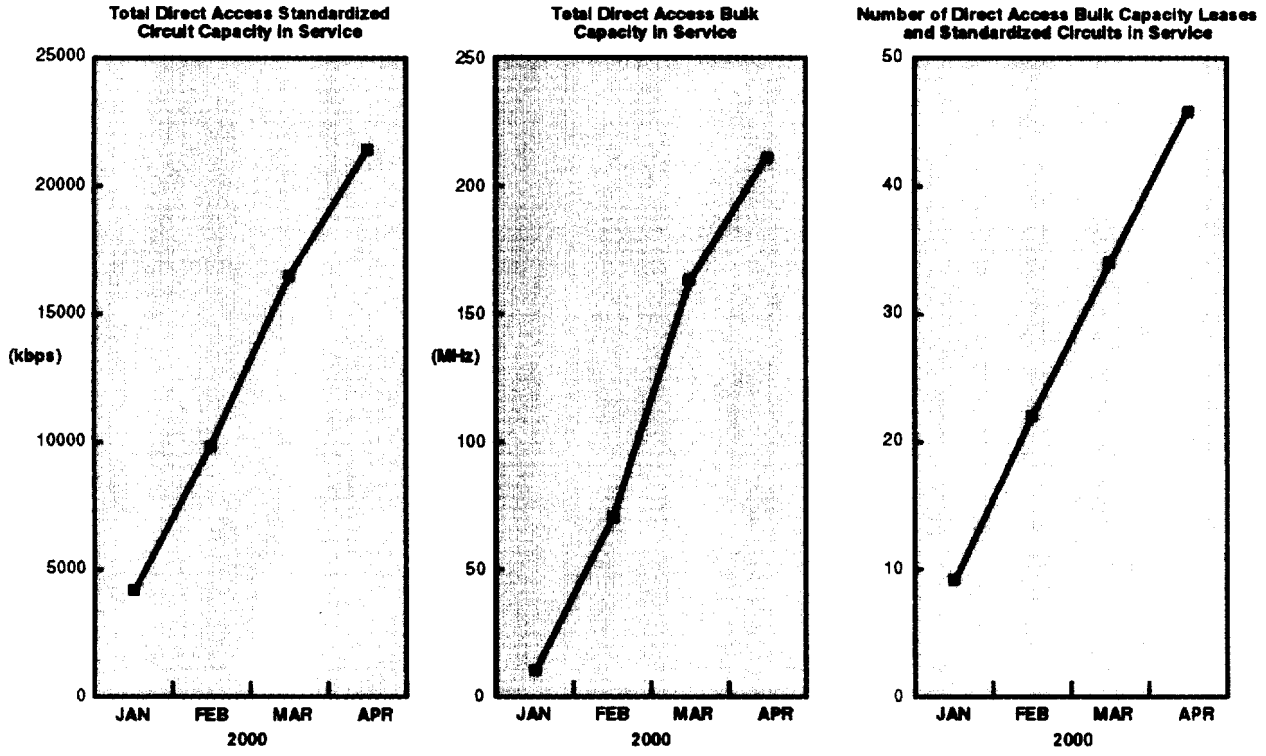
[4] Pursuant to a Commission request, COMSAT voluntarily modified its original direct access tariff, U.S. direct access users no longer provide COMSAT with contemporaneous order information regarding the type or amount of INTELSAT space segment capacity sought, either in connection with the FCC-approved surcharge collection procedures or otherwise. Instead, COMSAT now receives such information only from INTELSAT, and only after the capacity has been sold. Accordingly, while COMSAT's data from INTELSAT is substantially complete through April 2000, the figures cited above do not capture any U.S. direct access usage of INTELSAT space segment capacity that began after April 30, 2000. Nonetheless, the trend toward increased direct access usage of INTELSAT reflected in the data is clear.

[5] Bulk Capacity agreements (also called "transponder leases") essentially permit a customer to occupy a specified full or fractional transponder for a fixed period of time. Such leases are "tailored" to meet the requirements of individual customers, and may be reserved in advance. Bulk Capacity is sold in units of power and bandwidth (eirp and megahertz), and is used primarily for video, VSAT, broadband, and Internet services. *See also* Subpart I.D, *infra* (discussing Bulk Capacity agreements in detail).

have become direct access customers; one of them has acquired as many as 21 leases/circuits directly from INTELSAT. Through April 2000, at least 49 different individual service orders have been accommodated, including 23 orders for Bulk Capacity and 26 for Standardized Circuits. In addition, almost 10,000 minutes of occasional-use video transmissions were supplied by INTELSAT to U.S. direct access customers through April 2000.

FIGURE 1
DIRECT ACCESS USAGE IS INCREASING RAPIDLY



Some current examples of U.S. direct access usage are as follows:

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[6] Standardized Circuits are capacity units that are purchased by common carrier customers to provide switched and private line service. Unlike Bulk Capacity, individual Standardized Circuits may not be reserved in advance (although INTELSAT does take carrier forecasts into account when it plans the Circuit portion of the INTELSAT system). Moreover, Standardized Circuits conform to standardized specifications, and are not "tailored" to suit individual customer needs. Standardized Circuits are measured in terms of throughput (kilobits and megabits per second).

- one major U.S. retail carrier has obtained two five-year capacity leases; 19 one-year standardized circuits; and 1,520 minutes of occasional-use video capacity;

- another U.S. carrier has obtained one five-year capacity lease; two three-year capacity leases; one one-year capacity lease; one short-term capacity lease; and three one-year standardized circuits;

- another U.S. carrier has obtained two five-year capacity leases and two short-term standardized circuits; and has also begun to obtain occasional-use video capacity;

- another U.S. company has obtained two three-year capacity leases and two one-year capacity leases;

- another U.S. company has obtained one ten-year capacity lease; one six-year capacity lease; and two three-year capacity leases;

- another U.S. company has obtained one 2.5-year capacity lease;

- another U.S. company has obtained one one-year capacity lease;

- another U.S. company has obtained one six-month capacity lease;

- another U.S. company has obtained two one-year standardized circuits;

- one U.S. subsidiary of a foreign Signatory has obtained one two-month capacity lease; one short-term capacity lease; and 3,560 minutes of occasional use video capacity;

- another U.S. subsidiary of a foreign Signatory has obtained one two-year capacity lease and 3,865 minutes of occasional use video capacity.

Plainly, the fact that so many U.S. carriers and users have already become direct INTELSAT customers provides compelling evidence that there *is* a reasonable ability to obtain such space segment capacity directly.

B. INTELSAT Currently Has Only A Small Amount of Available Space Segment Capacity.

As discussed in Subpart I.A, *supra*, many U.S. carriers and users are already obtaining INTELSAT space segment capacity directly from INTELSAT. That does not mean, however, that INTELSAT has been able to fill every order for direct access service. While COMSAT has no way of knowing how many direct access orders have not been accommodated, it *is* aware that

several of its own service inquiries have not been accommodated due to lack of capacity on the system. Table 1, below, illustrates COMSAT's service requirements that INTELSAT has been unable to accommodate due to capacity constraints, since the implementation of direct access.

TABLE 1
SUMMARY OF COMSAT SERVICES THAT COULD NOT BE ACCOMMODATED BY INTELSAT DUE TO CAPACITY CONSTRAINTS (DEC 6, 1999-MAY 2000)

Customer	Bandwidth (MHz)	Ocean Region[7]	Service	Timeframe
Customer A	2 x 36 MHz	POR	Internet lease	4Q99
	36 MHz	POR	Internet lease	4Q99
	4 x 36 MHz	AOR	Internet lease	1Q00
	36 MHz	AOR	Internet lease	1Q00
	2 x 36 MHz	AOR	Internet lease	1Q00
Customer B	4 x 36 MHz	AOR	Internet lease	4Q99
	8 Mb, 2 Mb, 27.2 MHz	AOR	Internet	1Q00
	2 Mb	AOR	IBS	1Q00
	1 Mb	AOR	IBS	1Q00
	2x2 MB, 27.2 MHz	POR	Internet	1Q00
	6 Mb	AOR	Internet	1Q00
	3x2 Mb	AOR	Internet	1Q00
	3x2 Mb	AOR	Internet	1Q00
	2 Mb	AOR	IBS	1Q00
	1.5 Mb, 2 Mb, 27.2 MHz	AOR	IBS	1Q00
Customer C	27.2 MHz	AOR	Internet Lease	1Q00
	2 x 27.2 MHz	AOR	Internet Lease	1Q00
Customer D	2 x 27.2 MHz	AOR	Internet Lease	3Q00
Customer E	36 MHz, 27.2 MHz, 6 MHz	AOR	Internet lease	2Q00
Customer F	36 MHz	POR	Internet lease	2Q00
Customer G	27.2 MHz	POR	Internet Lease	2Q00
Customer H	36 Mhz	AOR	Internet Lease	2Q00
Customer I	36 MHz	POR	Internet Lease	2Q00
Customer J	36 MHz	POR	Internet Lease	2Q00
Customer K	36 MHz	POR	Internet Lease	2Q00
Customer L	2 x 36 MHz	POR	Internet Lease	3Q00
Customer M	36 MHz	POR	Wideband Mobile	
	15 MHz	AOR	Internet Lease	3Q00
Customer N	2 x 27.2 MHz	AOR	Internet Lease	1Q00
	27.2 MHz	AOR	Internet Lease	2Q00
	27.2 MHz	AOR	Internet Lease	2Q00
	27.2 MHz	AOR	Internet Lease	2Q00

[7] The specific connectivities requested are competitively sensitive and are not shown in this table.

COMSAT has also received other inquiries from existing and prospective customers for capacity to particular countries. However, many customers are aware that capacity to these countries is so limited that they do not even attempt to pursue these requirements.

The fact that INTELSAT has been able to fill only some—but not all—orders tendered by Signatory and direct access customers does not mean, however, that either type of user has been deprived of a reasonable opportunity to obtain INTELSAT capacity directly.[8] Rather, this fact simply illustrates that INTELSAT does not possess an unlimited supply of space segment capacity that can serve the U.S.

Today, nearly 80% of the INTELSAT transponders that can access the U.S. are in operational use serving customer demand.[9] The remaining 20% are available for U.S. users, but less than half of them (*i.e.*, only 8% of the total) are in high demand from a U.S. customer requirements perspective,[10] and some of the most desirable connectivities are completely sold out. *See* Figure 2 below. Moreover, some of the capacity that is located in high-demand connectivities is fragmented over numerous transponders, and thus is not useful to users with

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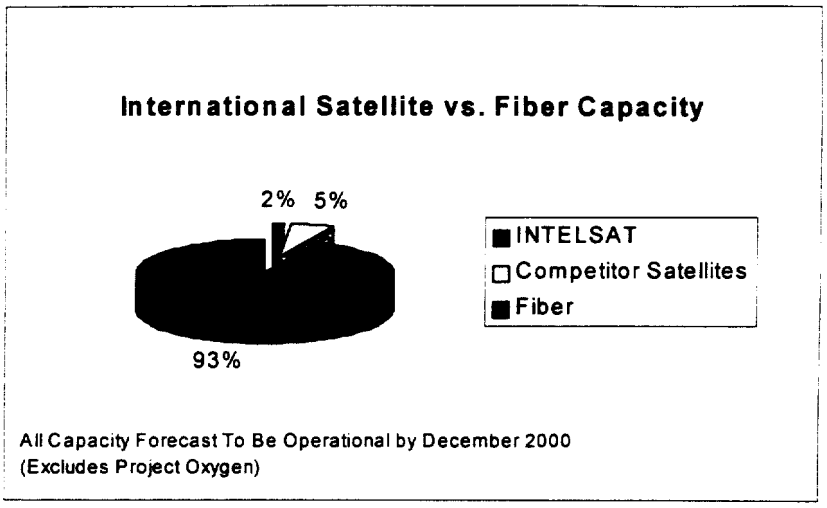
8 ORBIT calls only for a "sufficient opportunity to access INTELSAT space segment capacity," 47 U.S.C. § 641(b)—not an absolute guarantee that unlimited capacity will be available on demand.

9 A few transponders are unusable due to certain system constraints. These constraints are generally attributable to intersystem coordination restrictions or a failed subsystem on the satellite.

10 For example, most Internet traffic is asymmetric, with high traffic volumes outbound from the U.S. and much lower volumes inbound. Thus, U.S.-outbound capacity is in much greater demand than U.S.-inbound capacity.

FIGURE 4
INTELSAT PROVIDES ONLY A TINY FRACTION OF THE INTERNATIONAL TRANSMISSION CAPACITY SERVING THE U.S.



To meet increased demand, many of these satellite and cable competitors will deploy new transmission facilities during the next few years. And so will INTELSAT. As detailed in Table 1, *infra*, INTELSAT or its private successor entity Intelsat L.L.C. intends to launch nine new, higher-capacity satellites by 2003. Seven of these will serve the overburdened Atlantic Ocean Region ("AOR").[18] In addition, Pacific Ocean Region ("POR") capacity (which also serves the United States) will also soon be increased by the redeployment of more advanced satellites to one or more existing POR orbital locations. These new deployments will enhance considerably the opportunities for U.S. entities to obtain INTELSAT or Intelsat L.L.C. space segment capacity directly. *See* Figure 5, below.

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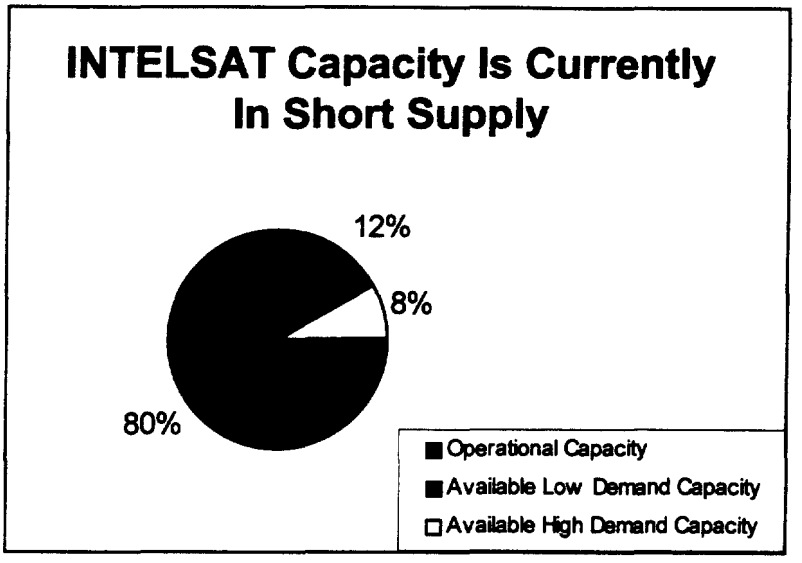
[18] Specifically, the INTELSAT 903, INTELSAT 904, INTELSAT 905, INTELSAT 906, INTELSAT 907, INTELSAT 10-1, and INTELSAT 10-2 are planned to serve the Atlantic Ocean Region. The INTELSAT 901 and INTELSAT 902 are planned to serve the Indian Ocean Region. The ultimate locations of these satellites could vary, based upon revisions to the deployment plan.

higher bandwidth needs. Complete information as to availability on specific connectivities is contained in Confidential Attachment A.[11]

Figure 2



This shortage of space segment capacity is not unique to INTELSAT. Rather, it mirrors similar shortages that are being experienced by the many satellite and undersea fiber cable operators that are INTELSAT's facilities-based competitors.[12] These shortages are primarily a product of the massive recent increase in demand for international transmission capacity that has accompanied explosive world-wide growth in Internet usage.[13] Because neither a satellite space

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[11] As the *Capacity NPRM* recommended, at ¶ 22, COMSAT is seeking confidentiality for this information at the request of INTELSAT. COMSAT agrees that this information is competitively sensitive.

[12] *See, e.g., SIA/Futron Study Predicts Rising Industry Growth In 2000, Fueled By DBS, Broadband*, Satellite News, Vol. 23, No. 25 (June 19, 2000) (discussing the shortages that have resulted from explosive growth in consumer demand and also to "delays in the number of satellites built and launched during 1999").

[13] *See, e.g.*, Jason Oxman, FCC Office of Plans and Policy, *The FCC and the Unregulation of the Internet*, 1999 FCC LEXIS 3370 (July 1999), *available online at* <http://www.fcc.gov/opp/workingp.html>. ("The growth of the Internet is nothing short of explosive, driven by the invention in this decade of the World Wide Web, which gives consumers a user-friendly platform

Continued ...

station nor a transoceanic submarine cable can be financed, constructed, and deployed overnight, this sudden increase in global demand has temporarily outstripped the supply of international transmission capacity.[14]

In considering the significance of this supply shortfall, it is important to keep in mind that INTELSAT capacity accounts for only a minor fraction of the total international transmission capacity now available to U.S. carriers and users. Moreover, unlike access to local exchange carrier facilities, access to INTELSAT capacity is not essential to originate or terminate user messages; users have numerous alternatives. INTELSAT faces intense facilities-based competition for the provision of global communications services from other geostationary satellite companies.[15] Indeed, as Figure 3 illustrates, of the more than 60 geostationary communications satellites that currently serve United States international traffic needs, INTELSAT owns only 13 (less than one quarter).[16]

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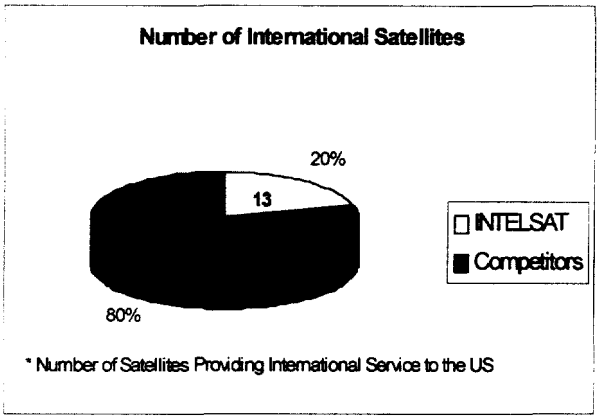
from which to access content in the online world."); *Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, ¶ 153 n. 420 (1998) (noting that "the growth in Internet traffic is currently doubling approximately every six months," and that, accordingly, "the demand for Internet [transmission] services more than doubles every year").

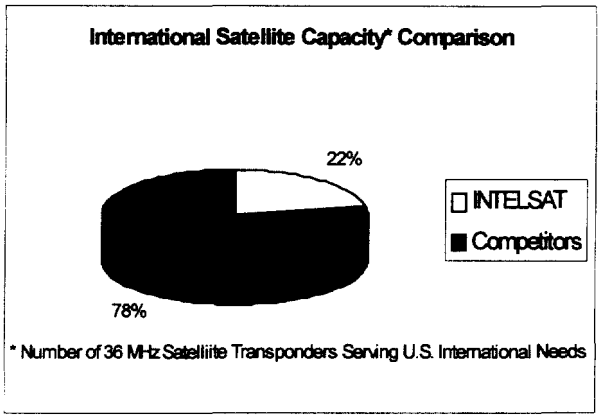
[14] Because INTELSAT does not pay U.S. taxes, the Commission itself has recognized that the price INTELSAT can charge U.S. users (even with the Signatory surcharge) gives it an advantage over COMSAT. This distortion may actually have exacerbated INTELSAT's current capacity shortage by stimulating demand due to below-cost pricing. *See Direct Access Order*, ¶¶ 106, 114-15.

[15] *See COMSAT Corp., Forbearance from Dominant Carrier Regulation*, 13 FCC Rcd 14083, 14096 (1998) ("*COMSAT Non-Dominance Order*") (recognizing that "other satellite companies effectively compete against [INTELSAT]" in virtually all services in most of the international markets), *modified, Policies and Rules For Alternative Incentive Based Regulation of COMSAT Corp.*, 14 FCC Rcd 3065 (1999).

[16] *Phillips Satellite Industry Directory* (22d ed. 2000) (setting forth complete information about each of these satellites and their operators). The remaining satellites are owned by strong U.S. competitors such as Hughes/PanAmSat, Loral Skynet/Telstar/Orion and GE American Communications. *Id.*

FIGURE 3
INTELSAT PROVIDES ONLY A SMALL FRACTION OF THE INTERNATIONAL SATELLITE CAPACITY SERVING THE U.S.





Moreover, as Figure 4 illustrates, and as the Commission itself has recognized, transoceanic submarine fiber optic cables also are highly substitutable competitive alternatives to INTELSAT.[17]

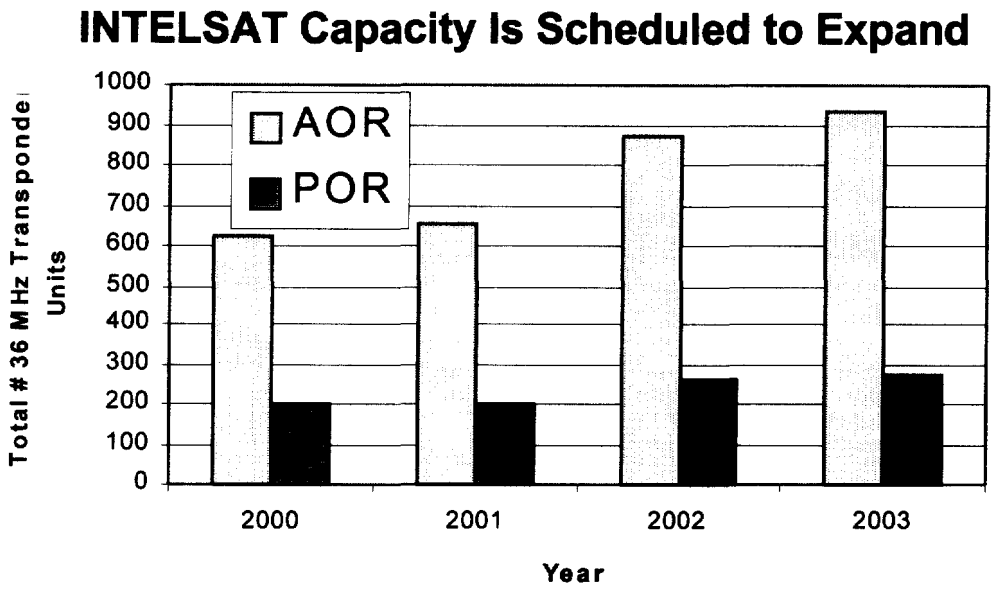
[17] *COMSAT Non-Dominance Order*, ¶ 32; *see also Direct Access Order*, ¶ 124 (acknowledging that INTELSAT's "relatively low [15] percent market share [of switched voice and private line traffic to and from the United States] suggests that long-term contracts have not acted as a barrier to further competition through fiber optic cable and satellite alternatives").

Specifically, between the first quarter of 2001 and the third quarter of 2002, INTELSAT is scheduled to deploy a series of seven new INTELSAT IX satellites, five of which will directly replace the INTELSAT VI satellites that are coming to the end of their station-kept life. The other two satellites in the INTELSAT IX series will replace two other AOR satellites (INTELSAT 801 and INTELSAT 705), freeing those satellites up to serve new roles, one in the AOR at 330.5° E.L. and one in the POR at 178° E.L. Upon the arrival of the INTELSAT IXs, four of the existing INTELSAT VI satellites (601, 602, 603, and 604) will be redeployed to serve in inclined orbit roles within the system. Of these four, two satellites (602 and 604) will be de-orbited in 2003. The fifth VI, INTELSAT 605, will be redeployed to a new role (340° E.L.) in the AOR. INTELSAT is also engaged in a construction project to build two additional satellites, referred to as the Alpha-1 and Alpha-2. These role-specific satellites will be available for service in the AOR in the first half of 2003. They will replace INTELSAT 707 at 359° E.L. and INTELSAT 709 at 310° E.L. The plan calls for INTELSAT 709 to be redeployed to the APR at 157° E.L. ,and for INTELSAT 707 to be redeployed to the POR at 180° E.L.

All INTELSAT VI traffic that has an expiration date extending into the period of planned INTELSAT IX deployment will be served by the new IXs. Since current traffic is entitled to renewal to maintain service continuity, for the purpose of discussing new capacity on the system, a worst case assumption can be made that all current INTELSAT VI capacity will be occupied on the new INTELSAT IX satellites. Figure 5 shows all station-kept capacity in the AOR and POR in the INTELSAT system, and the growth planned for the next three years. Where the INTELSAT IX deployments occur, the incremental capacity is due to the fact that the more advanced technology used on the INTELSAT IXs provides incremental capacity (with respect to what was available on the INTELSAT VIs being replaced) at each of the existing station kept

roles. Complete information as to the capacity of forthcoming INTELSAT satellites is contained in Confidential Attachment A.

FIGURE 5



Satellite	Location	Region	In-Service Date
901	62E	Indian Ocean	2d Quarter 2001
902	60E	Indian Ocean	3d Quarter 2001
903	335.5E	Atlantic Ocean	4th Quarter 2001
904	325.5E	Atlantic Ocean	4th Quarter 2001
905	342E	Atlantic Ocean	2d Quarter 2002
906	332.5E	Atlantic Ocean	3d Quarter 2002
907	328.5E	Atlantic Ocean	4th Quarter 2002
Alpha 1	310E	Atlantic Ocean	2d Quarter 2003
Alpha 2	359E	Atlantic Ocean	3d Quarter 2003

Accordingly, as the overall stock of international transmission capacity increases to meet existing demand, current capacity shortages will be alleviated. U.S. users will increasingly benefit from lower prices and increased competition envisioned by ORBIT. For these reasons, it

would plainly be unreasonable for the Commission to construe INTELSAT's current inability to fill each and every direct access order as an unreasonable denial of "sufficient opportunity" within the meaning of the ORBIT Act. In fact, INTELSAT is working diligently and expeditiously to create more capacity by constructing and launching the additional satellites needed to ameliorate the current industry-wide capacity shortage.

C. COMSAT's Business Practices Do Not Unreasonably Deprive Direct Access Users of INTELSAT Capacity.

ORBIT directs the Commission to "take such steps as may be necessary to prevent the circumvention of the intent of this section." 47 U.S.C. § 641(b). Inasmuch as the *Capacity NPRM* appears to assume that COMSAT is the only entity that might be inclined to circumvent such intent, the Commission's focus is too narrow. In any event, however, COMSAT has not engaged in any "warehousing" or hoarding of capacity. Rather, as discussed herein, the *Capacity NPRM* misconstrues certain fundamental and material aspects of COMSAT's business operations. In fact, every one of the business practices discussed in the *Capacity NPRM* is predicated upon legitimate business concerns and objectives.

1. COMSAT Does Not "Warehouse" Capacity That It Cannot Or Does Not Use.

INTELSAT operates on a first-come, first-served basis. Under this regime, COMSAT (and U.S. direct access customers) must compete for capacity with 143 Signatories and 239 other users of the INTELSAT system. This intra-system competition gives parties an incentive to procure capacity to match near-term growth forecasts. As the Commission is well aware, it is a standard practice in virtually all common carrier industries to plan for forecasted growth in this manner.

Thus, even if COMSAT were to reserve capacity for future growth with no immediate need, that would not necessarily be indicative of "warehousing." Such action (if it existed) could simply reflect a legitimate effort to meet anticipated customer requirements.[19] In fact, however, since the implementation of direct access, COMSAT has not reserved any new INTELSAT capacity except where it has an immediate and actual firm customer requirement to fulfill.[20] And in fact, as illustrated in Figure 6, below, virtually all of the capacity COMSAT has procured from INTELSAT is being used by U.S. customers. Just 2.6% of COMSAT's total committed Standardized Circuit capacity is not currently being used operationally, and only 2.4% of COMSAT's capacity earmarked for Bulk Capacity leases remains unsold. These minute quantities constitute all of the INTELSAT capacity that COMSAT holds but does not have in service.

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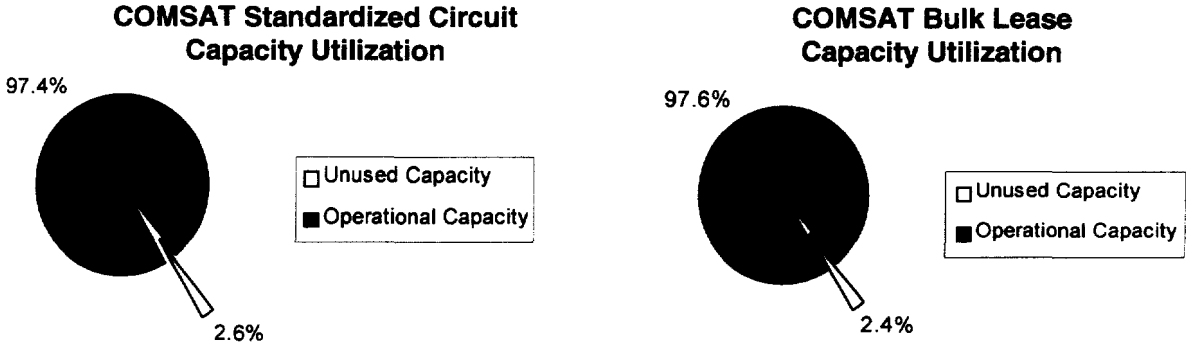
[19] Indeed, the FCC has recognized that one of COMSAT's many responsibilities as the U.S. Signatory has been to procure adequate capacity and size of the system to meet the forecasted needs of all U.S. carriers and broadcasters. This process occurs at INTELSAT Global Traffic Meetings ("GTMs"). *See, e.g., Communications Satellite Corp., Authority To Participate In Construction of High Power INTELSAT VII Series Communications Satellites*, 5 FCC Rcd 753, ¶¶ 5-6 (1990) (discussing COMSAT's forecasting and procurement activities at INTELSAT Global Traffic Meetings).

[20] Specifically, since December 6, 1999, COMSAT has placed a total of 32 guaranteed reservations for INTELSAT capacity. An immediate-term customer requirement is behind each of these 32 reservations. Moreover, during that same time, COMSAT did not place *even one* "right of first refusal" (FRR) reservation.

FIGURE 6
COMSAT IS NOT WAREHOUSING INTELSAT CAPACITY



a. Even Where COMSAT Has An "Automatic FRR," It Customarily Relinquishes INTELSAT Capacity For Which It Has Not Identified A Customer.

Roughly seventy percent of the INTELSAT space segment capacity furnished to U.S. carriers and users is supplied in the form of Bulk Capacity. Bulk Capacity (unlike Standardized Circuits, discussed below) can be reserved in advance, using either first right of refusal reservations (FRRs) or guaranteed reservations (GRs).[21] It essentially constitutes raw transmission capacity that is then tailored to satisfy the particularized needs of an individual customer. Generally, when a U.S. carrier or user leases INTELSAT Bulk Capacity from COMSAT for a term of years, COMSAT leases the underlying capacity from INTELSAT for precisely the same term. Similarly, when such a Bulk Capacity agreement expires, COMSAT's customers have an "automatic FRR" that gives them the right to renew with COMSAT, while COMSAT has a corresponding "automatic FRR" that gives it the right to renew with INTELSAT.

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[21] An FRR is essentially an option; a GR is a commitment to "take or pay" for the capacity at some future date.

COMSAT has not used its "automatic FRR" to prevent other carriers and users from obtaining direct access to INTELSAT space segment capacity. Nor has COMSAT warehoused capacity, either for competitive advantage or to undermine the statutory policy of direct access. To the contrary, since the *Direct Access Order* took effect, COMSAT has not exercised any automatic FRRs for INTELSAT space segment capacity without having in hand an underlying firm U.S. customer requirement.

Whenever one of COMSAT's Bulk Capacity agreements has been set to expire, COMSAT has offered its existing customer an opportunity to renew. If that customer declined, COMSAT in some cases has attempted to market the capacity to other customers for Bulk Capacity before relinquishing its automatic FRR. However, in every case where COMSAT has failed to obtain a firm capacity commitment from another customer, it has relinquished its automatic FRR — and hence the capacity.

Moreover, even in cases where COMSAT is not yet prepared to relinquish its automatic FRR (*e.g.*, because a new potential customer has expressed interest but has not yet closed the deal), potential direct access customers are free to "challenge" COMSAT for the capacity. *See Capacity NPRM*, ¶ 13 (noting that an FRR reservation "may be challenged by another customer seeking to place a guaranteed reservation on the same capacity"). In such instances, COMSAT "must either: (1) enter into a guaranteed reservation, (2) transfer the [FRR] reservation to alternative capacity, or (3) relinquish the first refusal reservation with refund of the fee." *Id.*

Notably, however, when an FRR (including an automatic FRR) is challenged, INTELSAT does not tell COMSAT who the challengers are. Thus, in the case of an "automatic" FRR, *COMSAT has no way of knowing whether the challenger is its existing customer, a new U.S. user, or someone else entirely (e.g., another INTELSAT Signatory or foreign direct access user)*. This effectively makes it impossible for COMSAT to use the challenge process or to take

advantage of its Signatory role in a targeted way to prevent its customers from "renewing" on a direct access basis.

Contrary to this fact, the *Capacity NPRM* suggests that COMSAT may also have an advantage in these situations because it can exercise its automatic FRR and "force" the customer to deal with COMSAT if it wants to stay on the capacity. That is simply not the case. As a matter of policy and practice, COMSAT has almost never reserved Bulk Capacity without a firm customer requirement, and no such reservations have been made since direct access was implemented.[22] Of the 56 Bulk Capacity leases that have come up for renewal since direct access was implemented, COMSAT has renewed 26 leases involving 584.6 MHz of capacity, and relinquished 30 leases involving 220.4 MHz. In every case where COMSAT renewed, it was on behalf of an existing customer. Therefore, in no case has COMSAT sold the capacity out from under a customer that wanted to retain use of the capacity, but as a direct access customer.

Moreover, INTELSAT has taken steps—not even mentioned in the *Capacity NPRM*—which have significantly diminished the utility of placing future FRR reservations. Specifically, in December 1999, the INTELSAT Board of Governors modified INTELSAT's lease reservation policy, effective immediately, to prohibit the placement of new FRR reservations more than six months before the scheduled start-of-service date. (Under the previous policy, customers had been allowed to place FRR reservations up to three years in advance of the scheduled start date.) COMSAT supported this change to the lease reservation policy, despite the fact that the change eliminated even the theoretical possibility for COMSAT to "lock up" future capacity years before its existing leases expired.

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[22] Indeed, as an economic matter, COMSAT lacks incentive to invest in capacity without the prospect of timely recovery of that investment through resale to a customer.

In sum, the facts demonstrate that COMSAT has not constrained the availability of Bulk Capacity; it gains no unfair competitive advantage from INTELSAT's reservation procedures; and the existence of the "automatic FRR" does not mean that users lack "sufficient opportunity" to obtain leased capacity on a direct access basis.

b. Thirty Percent of COMSAT's Customer Requirements Cannot Be Fulfilled By Reserving Capacity on the INTELSAT System.

As noted in Part I.C.1.a, *supra*, INTELSAT space segment capacity is packaged and marketed in two distinctive ways: pursuant to "Bulk Capacity" agreements (transponder leases), or as "Standardized Circuits." At present, about thirty percent of the COMSAT space segment capacity supplied to U.S. carriers and users takes the form of "Standardized Circuits."

Unlike Bulk Capacity, discussed above, Standardized Circuits are not "reserved" on an individual basis, as the *Capacity NPRM* seems to suggest. Instead, purchasers of Standardized Circuits are assigned to particular frequencies and transponders on certain INTELSAT satellites that have been earmarked for PSTN traffic. In its discussion of INTELSAT's system of reservations, the *Capacity NPRM* ignores altogether the existence of Standardized Circuits. *See Capacity NPRM*, ¶¶ 13-15. Accordingly, the *Capacity NPRM* fundamentally errs in its statement that "[t]he INTELSAT arrangements for capacity distribution to Signatories and direct access users provide a process through which INTELSAT capacity can be tied up well into the future, even before satellites are constructed and launched." *Id.* ¶ 15. In fact, the "process" to which the *Capacity NPRM* refers (*i.e.*, placing FRR or GR reservations) does not even apply to INTELSAT's provision of Standardized Circuits.

2. COMSAT Cannot Be Expected To Relinquish Standardized Circuits To Which It Has Already Committed Under Contract.

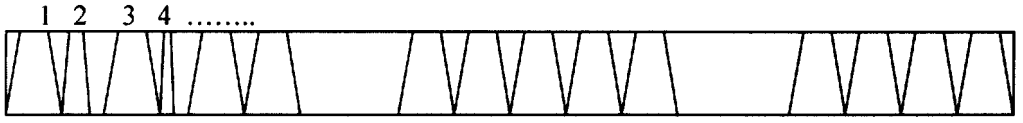
Standardized Circuits also differ from Bulk Capacity in other material respects. For example, the lease terms of Standardized Circuit uplinks and downlinks are not necessarily the same. Thus, a transmission path from the U.S. to a foreign destination may be on a Standardized Circuit that COMSAT has procured from INTELSAT under a 15-year contract, but COMSAT's while the return path to the United States may be on a Circuit that is contracted for only one year.

In addition, unlike the case with Bulk Capacity, the lease terms for standardized circuits are generally not the same for COMSAT as they are for its customers. For example, a transmission path from the U.S. to a foreign destination may be on a Standardized Circuit that COMSAT has procured from INTELSAT under a 15-year contract, but COMSAT's customer may have committed to lease that circuit from COMSAT for only seven years or even one year.

In many cases, COMSAT also aggregates the requirements of several carrier customers for Standardized Circuits (both existing and forecast) and purchases an entire transponder from INTELSAT to meet these requirements. This allows COMSAT to reduce its per-circuit costs and thereby offer lower prices to the carriers. However, it necessarily results in an asymmetry between COMSAT's obligations to INTELSAT and the carriers' obligations to COMSAT. *See* Figure 7, below; *see also* Confidential Attachment B, Figure 1.

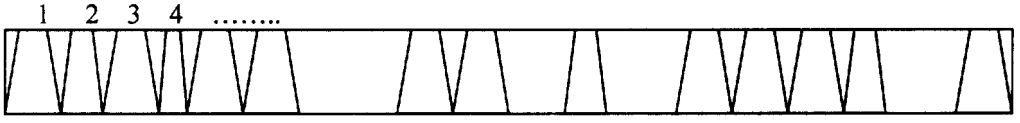
FIGURE 7
COMSAT's Commitments to INTELSAT for Circuit Capacity Do Not Match U.S. Carriers' Commitment to COMSAT
(Representative scenario only — does not indicate actual customer traffic)

Example 1: COMSAT Multi-Use 36 MHz Lease with INTELSAT (Expiration Date: 2010)



	Customer	Destination	Carrier Size	Customer Commitment Expires
1.	GE	Turkey	2048 kbps	6/30/01
2.	WCOM	Ghana	512 kbps	11/31/01
3.	ATT	Hungary	2048 kbps	5/31/02
4.	TRICOM	Portugal	256 kbps	12/31/02

Example 2: INTELSAT Frequency Pool



	Customer	Destination	Carrier Size	Customer Commitment Expires	COMSAT Commitment Expires
1.	COMSAT/ATT	Germany	2048 kbps	6/30/01	9/30/10
2.	Teleglobe	Zimbabwe	1024 kbps	11/31/01	n/a
3.	Embratel	Spain	2048 kbps	5/31/02	n/a
4.	COMSAT/GE	South Africa	512 kbps	12/31/02	9/30/10

In a direct access environment, this asymmetry clearly favors the carriers over COMSAT. The carriers can order circuits either from COMSAT or from INTELSAT (subject only to availability). And since COMSAT must sell its contracted inventory of space segment capacity, it has every incentive to offer highly competitive terms and conditions.

In some cases, a carrier whose commitment to COMSAT for a particular Standardized Circuit is expiring may wish to renew that Circuit on a direct access basis. It may therefore direct COMSAT to "disconnect" the circuit, in effect requesting COMSAT to relinquish it. However, unlike with Bulk Capacity, COMSAT may not be able to relinquish that Circuit, either because it

is located in a transponder that COMSAT has already leased in bulk or because it is on a Circuit commitment that has not expired and COMSAT cannot be assured that it will be able to obtain another Circuit of equivalent value.

Under INTELSAT's rules, COMSAT must continue to pay for Standardized Circuits leased under long-term contracts, whether or not those Circuits are actually in service. COMSAT cannot afford to pay for "vaporware," and therefore must retain enough actual, in-service circuits to cover its contractual commitments. But again, the fact that it is committed to pay INTELSAT for those Circuits gives COMSAT every incentive to make them available to customers on competitive terms.

The asymmetry between COMSAT's Standardized Circuit contractual commitments to INTELSAT and its underlying customer commitments did not arise from any COMSAT attempt to "circumvent" the ability of carriers to obtain direct access. Rather, those arrangements, which long predate the implementation of direct access to INTELSAT, were developed at the FCC's encouragement for COMSAT to offer the lowest prices to U.S. users.[23] Thus, any temporary "problems" reflected by those arrangements are mainly due to the lack of available INTELSAT capacity and will solve themselves as more capacity becomes available and users elect the best means of access, whether via COMSAT or otherwise.

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[23] *See generally Policy for the Distribution of United States International Carrier Circuits Among Available Facilities during the Post-1988 Period*, 3 FCC Rcd 2156 (1988) ("*1988 Circuit Distribution Decision*") (implementing policy encouraging COMSAT to enter into very long-term leases with INTELSAT); *see also Direct Access Order*, ¶ 125 (discussing origins of this policy) (citing *1988 Circuit Distribution Decision*).

D. The ORBIT Act's Requirements Must Be Understood in the Context of a "Rule of Reason."

The phrase "sufficient opportunity" is not defined in the ORBIT Act. Accordingly, the determination of whether U.S. carriers and users currently have "sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT," 47 U.S.C. § 641(b), should be understood in the context of Congress's purposes in enacting this provision.[24] As explained below, these purposes make clear that any right of access created by this legislation is not absolute. Rather, it should be construed consistently with the Commission's large body of common carrier precedent applying a "rule of reason" when construing statutorily imposed access requirements.[25]

The INTELSAT system was already experiencing a substantial system-wide shortage of space segment capacity when ORBIT was enacted in March 2000. Indeed, the *Capacity NPRM* notes that in 1999, the FCC was well aware of this situation, *Capacity NPRM*, ¶ 18, and was actively involved in the legislative process leading to ORBIT's enactment. Yet, notwithstanding this shortage, Congress left in place COMSAT's existing contractual arrangements for INTELSAT space segment capacity. Indeed, the ORBIT Act expressly precluded regulatory actions that would abrogate or modify such agreements.[26] Thus, because ORBIT clearly requires

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[24] *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (statutory provisions must be interpreted "in connection with the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature").

[25] *See United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (statutes should be interpreted to "produce[] a substantive effect that is compatible with the rest of the law"); *see also* Subpart I.A, *infra* (discussing the Commission's precedents applying a "rule of reason" when construing statutorily-imposed access requirements).

[26] 47 U.S.C. § 641(c). *See also* Subpart II.B, *infra*.

the Commission to take due account of existing capacity constraints and contractual arrangements, Congress in effect has established a "rule of reason" approach in applying the "sufficient opportunity" test of Section 641(b),

This approach is fully consistent with similar "rule of reason" policies that the Commission has long followed in other analogous contexts.[27] Indeed, even incumbent local exchange carriers (ILECs)—who are required by statute to provide traffic routing service to interexchange carriers (IXCs) and competitive local exchange carriers (CLECs) "upon reasonable request"—are "only required to make services available *to the extent that such services are or can be made available with reasonable effort*, and that services offered under the provisions of its tariff are *subject to availability*." *Allnet Communication Servs., Inc. v. Public Serv. Tel. Co.*, 11 FCC Rcd 12766, ¶¶ 15, 31, 34 (Common Carrier Bur. 1996) (discussing 47 U.S.C. § 201(a)) (emphasis added).[28] Unlike the ILECs, however, COMSAT is not a dominant carrier that users

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[27] *See, e.g., Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, ¶¶ 184-85 & n.430 (1996) (adopting a "rule of reason" for determining whether a vertically integrated DBS satellite programmer's refusal to deal with a particular multi-channel video programming distributor constitutes unlawful "discrimination"), *modified in part*, 11 FCC Rcd 20227 (1996), *and rev'd in part in other respects, City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999); *MCI Communications Corp. & British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, 9 FCC Rcd 3960, ¶ 48 & n.92 (1994) (employing "rule of reason" analysis to judge the lawfulness of a territorial allocation between carriers pursuant to a joint venture, in light of economic justification and competitive effects); *Commission Policy in Enforcing Section 312(a)(7)*, 68 FCC 2d 1089 (1978) (adopting a "rule of reason" to balance the needs of political candidates with the interests of broadcast licensees, when implementing statute requiring broadcast stations to allow "reasonable access" to candidates), *aff'd, CBS Inc. v. FCC*, 453 U.S. 367, 387 (1981).

[28] The right of a CLEC or IXC to obtain service from an ILEC is not absolute. *See Allnet Communications Servs.*, 11 FCC Rcd 12766, ¶¶ 20, 34, 39-40 (denying IXC's complaint against ILEC, where the services requested were not available and could not be made available with reasonable effort). Rather, even where a common carrier has a statutory duty to provide service or to interconnect with other carriers, a user who is turned away because no capacity is available at the time has not been denied any right to carriage. *See id.* Certainly, any definition of ORBIT's phrase "sufficient opportunity" should incorporate the basic common carrier law

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must access to send or receive international communications.[29] *A fortiori*, if dominant ILECs need only provide access to essential facilities "subject to availability," then ORBIT should not be construed to require COMSAT—a non-dominant carrier—to guarantee access to INTELSAT's facilities without any such qualification.

II. Even Assuming That Users Experience Cognizable "Problems" in Obtaining Direct Access, ORBIT Imposes Specific Limitations On the Kinds of Regulatory "Solutions" That Would Be Permitted.

It is premature for the Commission to consider solutions when there is no evidence of any real problem. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 50 (D.C. Cir.) (FCC may not predicate a rulemaking on "speculation and innuendo"; instead, any "solution" must stem from "a record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate of the agency"), *cert. denied*, 434 U.S. 829 (1977); *accord Century Communications Corp. v. FCC*, 835 F.2d 292, 303 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (same). Here, Congress has made it clear that, if the Commission finds that "sufficient opportunity" does exist, that is the end of the matter. Accordingly, the FCC should defer

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principle that even a statutory right to obtain access to carrier capacity may be exercised only "subject to availability." *Cf. American Distance Education Consortium*, 14 FCC Rcd 19976, ¶ 22 (1999) (requiring a DBS satellite carrier to "provide space for public interest programmers at the orbit location of their choice *subject to availability*") (emphasis added).

[29] *See COMSAT Non-Dominance Order*, 13 FCC Rcd 14083, ¶ 180 (1999) (finding that COMSAT exercises no market power "with respect to its provision of INTELSAT services in the switched voice, private line, full-time video, and occasional-use video services to competitive markets"), *modified*, *Alternative Incentive Based Regulation of COMSAT Corp.*, 14 FCC Rcd 3065 (1999) (finding that COMSAT cannot exercise undue market power even on the few remaining international routes that are not served by any other system, by virtue of the incentive regulation plan approved by the agency); *see also Direct Access Order*, 14 FCC Rcd 15703, ¶ 124 ("On a global basis Comsat now accounts for no more than a 15 percent average global market share of the transmission capacity utilized for switched-voice and private line services. This relatively low market share suggests that these long-term contracts have not acted as a barrier to further competition through fiber optic cable and satellite alternatives.").

consideration of "appropriate action" unless and until it is demonstrated that: (1) a problem exists; (2) it is due to a proven attempt to circumvent the statute; and (3) commercial negotiations have failed to resolve the problem. In this regard, the FCC has correctly placed the burden on direct access users to demonstrate that they have "unique" needs that are not being met. *See Capacity NPRM*, ¶¶ 27-28.

To make such a showing, the users' burden of proof must be very high. Just last year, when capacity on the INTELSAT system was as tight as it is today,[30] and when COMSAT still enjoyed exclusive access to INTELSAT in the United States, the Commission found no evidence of a problem. *See Direct Access Order*, ¶ 128 ("The proponents of portability have provided no evidence to support their contention that INTELSAT will be unable to provide sufficient capacity to U.S. direct access customers."); *see also id.* ¶ 3 ("[T]he record does not support at this time requests by carriers advocating 'portability' of INTELSAT space segment capacity that is held by Comsat.") (footnote omitted); *id.* ¶ 203 (rejecting all "carrier requests for portability of INTELSAT space segment"). Since September 1999, no new "problems" have developed. Rather, ORBIT has been enacted, direct access has been implemented, and numerous U.S. customers have already begun to take space segment capacity directly from INTELSAT. Absent other facts, it is not necessary at all to consider what remedial actions might be "appropriate." To do so would constitute the classic example of a "solution in search of a problem."[31]

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[30] *See Capacity NPRM*, ¶ 18 (noting that in 1999, there was "very little capacity currently available for service to and from North America that could be used by U.S. direct access users"); *Direct Access Order*, ¶ 203 (characterizing direct access as "a *forward-looking* policy that permits U.S. carriers additional choice in *future* decisions on obtaining INTELSAT space segment capacity") (emphasis added).

[31] *See, e.g., Truth-In-Billing and Billing Format*, 14 FCC Rcd 7492, 7568 (1999) (Separate Statement of Comm'r Michael K. Powell, Comm'r, concurring) ("It is critical to the process of regulators ceding control to the market that enforcement not become a solution in search of a

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However, it is not too early to conclude that certain actions would be inappropriate, whatever temporary concerns may exist. Given the express proscription in ORBIT Section 641(c), it would be inappropriate—indeed, illegal—for the FCC to abrogate, modify, or interfere with COMSAT's existing capacity contracts with INTELSAT. In addition, it would be inappropriate to adopt the Satellite User Coalition ("SUC") proposal in the name of "direct access" under ORBIT. In fact, the SUC proposal advances a demand for an unprecedented rate prescription on a non-dominant carrier (COMSAT), not "Level III direct access" to INTELSAT.

Finally, it would be inappropriate to place any restrictions on the post-privatization distribution arrangements of Intelsat L.L.C. Although Section 641 directs the FCC to ensure that users have sufficient opportunity to obtain "Level III direct access" to "INTELSAT," it does not provide a basis for regulating the distribution arrangements of INTELSAT's private successor entity, Intelsat L.L.C. To the contrary, Intelsat L.L.C. will not satisfy ORBIT's detailed, specific definition of "INTELSAT." Nor will Intelsat L.L.C. have any "Signatories"—rendering moot the concept of "Level III direct access."

A. The Commission Should Foster Commercial Solutions Before Resorting to Regulatory Ones.

The *Capacity NPRM* asserts that "the first option for resolving [any hypothetical lack of "sufficient opportunity"] should be commercial solutions between COMSAT and users and service providers seeking to access INTELSAT directly through space segment capacity held or reserved by COMSAT." *Capacity NPRM*, ¶ 25. COMSAT fully agrees with the Commission

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problem that has not yet been *identified*. Neither should we suggest that we do not *need* a problem to solve in order to justify imposing additional regulatory burdens on market participants, simply because we believe those requirements may benefit consumers. If such an unprincipled approach were valid, there would be no limit to the requirements we could impose on carriers. . . .") (emphasis in original).

that, in the event of any problem, commercial solutions should come first. In fact, the ready availability of commercial "solutions" provides compelling evidence of the illusory nature of any supposed direct access "problem."

For example, shortly after the release of the Commission's *Direct Access Order*, COMSAT renegotiated its commercial arrangements for INTELSAT capacity with its two largest customers. First, a renegotiation with AT&T resulted in an extension of AT&T's current long-term contract for Standardized Circuits, which now runs through 2006.[32] COMSAT was able to retain AT&T's business, and AT&T gained the economic "benefits of direct access" in the form of significant rate reductions and greater flexibility. This mutually beneficial transaction demonstrates the accomplishment of one of the FCC's primary goals for adopting direct access—*i.e.*, to foster competition between COMSAT and INTELSAT. Moreover, the very real possibility that AT&T would bypass COMSAT and purchase space segment capacity directly from INTELSAT contributed significantly to the "commercial solution" ultimately reached by the two parties.

For similar reasons, MCI WorldCom has also recently entered into a new post-ORBIT contract amendment under which it is eligible for reductions in the rates for all Standardized Circuits obtained through COMSAT during the next two years.[33] Significantly, MCI WorldCom is also a direct access customer, but this contract gives it a substantial incentive to continue routing a large portion of its INTELSAT traffic through COMSAT. Moreover, COMSAT's negotiations with the third major carrier, Sprint, are still ongoing.

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[32] COMSAT's new contract with AT&T was filed with the Commission on November 15, 1999.

[33] COMSAT's new contract amendment with MCI WorldCom was filed with the Commission on June 21, 2000.

This course of conduct involving the nation's three largest IXCs strongly suggests that there is no direct access "problem" requiring government intervention in any form. Clearly, the marketplace is working. There is no need to return to the days of regulated competition. The IXCs are sophisticated customers that are fully capable of looking out for their own best interests. COMSAT's post-direct access contracts with AT&T and MCI WorldCom fully demonstrate the viability of such commercial resolution for access to INTELSAT space segment capacity.

Moreover, customers for Bulk Capacity have also benefited from the availability of direct access even when they have chosen to renew their leases with COMSAT. Since direct access was implemented, virtually every COMSAT customer that has renewed a Bulk Capacity lease has done so at a lower price. *See* Confidential Appendix C, Figure 2. Moreover, COMSAT continues to compete with INTELSAT for the business of all U.S. users on the basis of its prices, customer responsiveness, experience in network management, technology innovation (such as COMSAT's new Link One products and services), and reliability. Accordingly, ORBIT's ultimate goals of increasing competition and lowering prices for end users are now being realized, even as customers have opted to renew their leases or contracts with COMSAT.

B. Abrogation of Contracts Cannot Constitute "Appropriate Action" Under ORBIT.

Section 641(c) of ORBIT provides that "[n]othing in this section shall be construed to permit the abrogation or modification of any contract." 47 U.S.C. § 641(c). Accordingly, the *Capacity NPRM* does not propose to abrogate any of COMSAT's existing contracts. It does, however, request comment on Section 641(c)'s effect "on existing precedents that permit the Commission to prescribe changes in contracts if it finds provisions unlawful or to modify contract provisions if in the public interest." *Capacity NPRM*, ¶ 24 n.40 (citing cases).

As a threshold matter, it must be noted that the Commission's existing authority "to prescribe changes in contracts" has been exercised quite sparingly, and only in exceptional cases. Indeed, the standard for abrogating private contracts is so rigorous, and the measure so extraordinary, that the FCC has done so only four times in the last 65 years.[34] In each of these instances, the Commission's action was predicated upon the following three factual findings: (1) the entity at issue had market power; (2) the entity had exercised that power to create long-term contracts that "locked up" so much of the relevant market that the agreements constituted "unreasonable barriers" to competition; and (3) the contractual obligations could be nullified without harm to the public interest.[35]

Here, because the provision of INTELSAT space segment capacity (and access thereto) is not a "market" (INTELSAT being only one supplier in larger defined markets),[36] none of the

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[34] *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16044-45 (1996) (First Report and Order) (nullifying termination liability provisions in "nonreciprocal" transport and termination contracts between *de facto* monopoly LECs and wireless network service providers); *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341, 7342, 7346-48 (1993) (Second Memorandum Opinion and Order on Recon.) ("*Expanded Interconnection Order*") (nullifying some but not all termination liability provisions in contracts of *de facto* monopoly LECs governing special access interconnection terms); *Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677, 2682-83 (1992) (Memorandum Opinion and Order on Recon.) ("*Interexchange Competition Order*") (ordering *de facto* monopoly carriers to offer 800 number services on unbundled basis); *Allocation of the 849-851 MHz/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583 (1991) (Memorandum Opinion and Order on Recon.) ("*Air-Ground Telephone Service Order*") (nullifying termination liability provisions in air-ground telephone service contracts between "*de facto* monopoly" GTE Airfone and airlines).

[35] *See Expanded Interconnection Order*, 8 FCC Rcd at 7342, 7346-48; *Air-Ground Telephone Service Order*, 6 FCC Rcd at 4583.

[36] In the *COMSAT Non-Dominance Order*, 13 FCC Rcd 14083, ¶¶ 2, 49, the Commission identified five relevant "markets" in which COMSAT competes. These markets are: (a) all switched voice and private line services on competitive international routes; (b) all occasional-use video service on competitive international routes; (c) all full-time video service and earth station services on all routes; (d) all switched voice and private line service on non-competitive

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requisite elements is present. Rather, the Commission has already determined that COMSAT does not exercise any undue power in the relevant defined markets for international communications transmission services.[37] Moreover, the Commission has also determined that COMSAT has not "locked up" the market for international switched voice service through its existing long-term contracts for INTELSAT capacity.[38] Finally, COMSAT's long-term contracts with INTELSAT have served the public interest substantially. Based on these long-term commitments, COMSAT and INTELSAT have planned and "sized" the INTELSAT system and have procured satellites specifically to meet customer needs. Moreover, COMSAT's firm capacity arrangements with INTELSAT—for a remaining period of up to 10 years—have lowered prices for *all* customers, not just the major carriers.

In implementing ORBIT Section 641, the FCC must "take such steps as may be necessary to prevent the circumvention of *the intent* of [Section 641.]" 47 U.S.C. § 641(b) (emphasis added). Here, regardless of whatever general authority the Commission may have to abrogate or

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"thin routes"; and (e) all occasional-use video service on non-competitive "thin routes." The Commission in the *COMSAT Non-Dominance Order* flatly rejected the notion that access to INTELSAT is itself a market. *Id.* ¶ 49.

37 *COMSAT Non-Dominance Order*, 13 FCC Rcd 14083, 14121 (classifying COMSAT as a non-dominant carrier on every major route to or from the United States); *see also Policies and Rules for Alternative Incentive Based Regulation of COMSAT Corp.*, 14 FCC Rcd 3065 (1999) (finding that COMSAT exercises no undue market power even on the few remaining "thin routes" served by no satellite system other than INTELSAT). In reaching these determinations, the Commission noted that fiber-optic cables are substitutable for INTELSAT space segment capacity in the switched voice and private line markets, and that separate satellite systems are substitutable in the video market. *See COMSAT Non-Dominance Order*, 13 FCC Rcd at 14103, 14114.

38 *COMSAT Non-Dominance Order,* 13 FCC Rcd at 14120-21 (noting that INTELSAT space segment capacity was used to carry less than 25% of international switched voice traffic in 1997, and likely would be used to carry an even smaller share in the future, and concluding that "COMSAT's long-term contracts do not impede COMSAT's customers from switching service providers").

modify contracts in other contexts, Congress clearly did not intend such authority to be exercised in the present context. *See id.* § 641(c) ("Nothing in this section shall be construed to permit the abrogation or modification of any contract."). Accordingly, Section 641(b)'s requirement that the Commission give effect to Congress's *intent* forecloses the Commission from abrogating or modifying COMSAT's existing contracts for the purpose of effectuating the ORBIT Act's direct access requirement. Stated differently, for the Commission to force COMSAT to relinquish INTELSAT capacity that it already procured under contract from INTELSAT whenever a COMSAT customer opts to pursue direct access would render Section 641(c) a nullity and thereby violate Section 641(b).

C. The SUC Coalition Proposal Would Not Be An "Appropriate Action" To Implement "Direct Access."

In the *Capacity NPRM*, the Commission notes a proposal that "when a user's existing contract with COMSAT expires, the user should have the opportunity to renew its access to INTELSAT, through COMSAT, but by paying COMSAT the INTELSAT Utilization Charge (IUC) for the service plus a network management fee to cover COMSAT's costs for circuit orders, change orders, and billing and collection. *Capacity NPRM* ¶ 26 (discussing SUC proposal). The Commission requests comment on whether the SUC Coalition proposal would constitute "appropriate action" under ORBIT section 641(b). It would not.

As a threshold matter, it must be noted that the SUC proposal is not actually a "direct access" proposal at all. The proposal would not implement "direct access to INTELSAT . . . through purchases of such capacity or services *from INTELSAT* . . . at the level commonly referred to by INTELSAT . . . as 'Level III.'" 47 U.S.C. § 641(a) (emphasis added); *see also Direct Access Order*, ¶ 8 ("Level 3 direct access permits customers to enter into a contractual agreement with INTELSAT for ordering, receiving, and paying for INTELSAT space segment

capacity at the same rates that INTELSAT charges its Signatories."). Rather, SUC proposes that users should purchase such capacity or services *from COMSAT*, but at a prescribed rate. Accordingly, the SUC proposal fails to "facilitate" or implement "Level III . . . direct access to INTELSAT," as required under Sections 641(a) and 641(b).

In actuality, SUC is proposing a mandatory rate prescription that is neither contemplated by ORBIT nor warranted in a competitive satellite services market.[39] Yet the *Capacity NPRM* invokes no statutory authority for a rate prescription. Nor does the present proceeding satisfy the procedural or evidentiary requirements of a rate prescription proceeding. Moreover, the SUC rate prescription proposal also would run afoul of the Constitution, by requiring COMSAT to provide service at a constitutionally inadequate rate of return, in violation of the Fifth Amendment. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989) (Fifth Amendment protects private entities "from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory"). Indeed, COMSAT is unaware of any instance in history in which the Commission has ever imposed a rate prescription on a non-dominant carrier.

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[39] Notably, the very proceeding in which the Commission recently rejected the same "Portability" proposal revisited here "incorporated by reference the relevant portions of the record from the *Comsat Non-Dominant* proceeding." *Direct Access Order*, ¶ 13 & n.27. In that proceeding, the Commission held that COMSAT was a non-dominant player in a fully competitive market for international telecommunications services.

D. Regulation of Intelsat L.L.C.'s Post-Privatization Distribution Arrangements Would Not Constitute "Appropriate Action" Under ORBIT.

1. The ORBIT Act's "Direct Access" Requirement Does Not Apply To Intelsat L.L.C.

The *Capacity NPRM* requests comment on whether the post-privatization distribution arrangements of Intelsat L.L.C.[40] may "resolve or exacerbate any problems with the ability of U.S. users and service providers to obtain INTELSAT capacity to meet their needs." *Capacity NPRM*, ¶¶ 16-17 on p. 6.[41] This query, however, misinterprets key terms in the ORBIT Act, and misunderstands the nature of Intelsat L.L.C.

Contrary to the assumption underlying the Commission's query, ORBIT does not require or authorize "direct access" to Intelsat L.L.C. Indeed, the statute makes provision *only* for "direct access to *INTELSAT* telecommunications services." 47 U.S.C. § 641(a) (emphasis added). "INTELSAT," in turn, is a carefully defined term in ORBIT that "means the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)." *Id.* § 681(a)(1); *see also Direct Access Order*, ¶ 5 ("INTELSAT is an intergovernmental organization in which an Assembly of Parties, comprised of government representatives, determines overall policy, and a

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[40] Intelsat L.L.C. is a Delaware corporation that has applied for FCC licenses for the 17 space stations that currently constitute the INTELSAT system. *See Application of Intelsat L.L.C. for Authority to Operate, and to Further Construct, Launch, and Operate, C-Band and Ku-Band Satellites that Form a Global Communications System in Geostationary Orbit*, File Nos. SAT-A/O-20000119-0002/18, SAT-AMD-20000119-0029/41, SAT-LOA-20000119-0019/28 (filed Jan. 18, 2000) ("*Intelsat L.L.C. Application*"). Intelsat L.L.C. "as a private entity . . . [seeks] to operate the existing global communications system as a conventionally-licensed U.S. system. . . ." *Id.* at 2.

[41] The *Capacity NPRM* contains a paragraph numbering error. Two separate paragraphs are each numbered "16" and "17". Accordingly, these Comments refer to the page numbers, as well, when discussing paragraphs 16 and 17.

Board of Governors, comprised of Signatories who are the investors in the system, make commercial decisions. Comsat is the U.S. Signatory to INTELSAT.").

Intelsat L.L.C., in contrast, was established under the Delaware Corporations Code. It was not "established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)." 47 U.S.C. § 681(a)(1). Nor is Intelsat L.L.C. "an intergovernmental organization in which an Assembly of Parties, comprised of government representatives, determines overall policy, and a Board of Governors, comprised of Signatories who are the investors in the system, make commercial decisions." *Direct Access Order*, ¶ 5. Rather, it is a private company with a Board of Directors whose stock will be publicly traded following an initial public offering. Indisputably, Intelsat L.L.C. is not "INTELSAT" within the meaning either of ORBIT or of the *Direct Access Order*.

Indeed, Intelsat L.L.C. is expressly defined by ORBIT as a "successor entity," *i.e.*, "any privatized entity created from the privatization of INTELSAT . . . or from the assets of INTELSAT. . . ." 47 U.S.C. § 681(a)(7). ORBIT, however, makes no provision for "direct access" to "successor entities."

In addition, ORBIT specifically repeals Sections 102 and 201(c) of the Communications Satellite Act of 1962, 47 U.S.C. §§ 701, 721(c), upon which the Commission relied as authority for implementing direct access to INTELSAT. *Compare* 47 U.S.C. § 645(4) (enacted Mar. 17, 2000) (repealing 1962 Act provisions upon completion of successful INTELSAT privatization) *with Direct Access Order*, ¶¶ 173-74 (relying on these provisions for authority to implement direct access to INTELSAT); *see also Capacity NPRM*, ¶ 9 (noting that Sections 102(c) and 201(c)(2) of the 1962 Act remain in effect only until privatization is certified complete). The FCC's sole authority to act in this area now comes from ORBIT. Yet, as noted, ORBIT provides

no statutory basis for the Commission's proposal to regulate the post-privatization distribution arrangements of Intelsat L.L.C.

2. Intelsat L.L.C.'s Post-Privatization Distribution Requirements Will Comply With the Commission's Preferences.

Because ORBIT does not address the post-privatization distribution arrangements of Intelsat L.L.C., the *Capacity NPRM*'s open-ended inquiry into such distribution arrangements is not properly part of the present proceeding, which was initiated to implement Section 641(b) of ORBIT. *Capacity NPRM*, ¶ 1. Moreover, because neither ORBIT nor the Communications Satellite Act of 1962 (nor any other statute) provides the Commission with authority to subject the distribution arrangements of Intelsat L.L.C. to unique and individualized regulatory burdens, the present inquiry into such distribution arrangements is not warranted. Nonetheless, COMSAT hereby provides the following information requested by the Commission.

Upon privatization of INTELSAT, the INTELSAT Operating Agreement and INTELSAT's current distribution arrangements will cease to be effective. Indeed, the entire lexicon of "direct access" terminology, which distinguishes between Signatories to INTELSAT's Operating Agreement and users that are not Signatories to the Operating Agreement, as well as INTELSAT's current four levels of direct access, will become obsolete. However, the fact that the Level III direct access mandated by the ORBIT Act will cease to be a meaningful concept upon privatization does not mean there is no direct access or that the benefits of direct access will be lost. To the contrary, post-privatization, *all* of Intelsat L.L.C.'s customers will, in effect, have the opportunity to be "direct access" users.

In 1999, with COMSAT's endorsement, the Twenty-Fourth Assembly of Parties determined that Intelsat L.L.C. should have a retail role upon privatization. *Cf. Capacity NPRM*, ¶¶ 16-17 (asserting that Intelsat L.L.C. should have a retail role). For this reason, the

management of the new company will have a duty to develop a business plan for its retail services. In addition, the Twenty-Fourth Assembly has authorized Intelsat L.L.C. "to enter into new service agreements to provide satellite services direct to customers on an independent and transparent basis, and to enter into agreements with new distributors for services as may be commercially appropriate." AP-24-3E Provisional P/10/99, ¶ 20(g), at 15 (Oct. 28, 1999); *see also Capacity NPRM*, ¶¶ 16-17 (favoring same). Accordingly, post-privatization distribution arrangements for C/Ku-band services *cannot* be exclusive to former Signatories. Moreover, in serving the United States, Intelsat L.L.C. and its U.S. distributors would be subject to the same U.S. laws and regulations as its competitors. *See* 47 U.S.C. § 621(3) (enacted Mar. 17, 2000) (providing that Intelsat L.L.C. shall not be immune from U.S. law or legal process).

Consistent with the Commission's preference, Intelsat L.L.C.'s post-privatization distribution arrangements for C/Ku-band services will be non-exclusive. *See* AP-24-3E Provisional P/10/99, ¶ 16(b)(ix), at 10 (Oct. 28, 1999) (requiring Intelsat L.L.C. "to provide international and domestic satellite communications infrastructure, and to seek market access, on the same basis as is provided to other entities providing similar services"). Moreover, because Intelsat L.L.C. will have the commercial flexibility to enter into new distribution arrangements, new distributors will not be discriminated against.

Finally, the Commission should be aware that the capacity used by existing direct access users who are not distributors will be protected upon privatization. At present, INTELSAT's current management is contacting all existing users to ensure the appropriate transfer of service arrangements to the new company. Upon privatization, all service commitments from INTELSAT's customers—including direct access users—will be transferred to Intelsat L.L.C. At that time, such customers will be able to enter into service agreements regardless of whether they are distributors.

CONCLUSION

As demonstrated above, there is no evidence that users lack sufficient opportunity to obtain direct access. The Commission should so conclude and terminate this inquiry promptly.

Respectfully submitted,

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